

SENATE COMMITTEE ON INDIAN AFFAIRS

Testimony of Brift E. Clapham, II
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on

S.612 - The Indian Needs Assessment and Program Evaluation Act

April 5, 2000

Good Morning, I am Brift E. Clapham, II, Deputy Attorney General, Navajo Nation Department of Justice, I am here on behalf of the Navajo Nation and have been authorized by the Intergovernmental Relations Committee of the Navajo Nation Council to provide you with the Navajo Nation's position on S.612.

As background, the Navajo Nation has sought to revise the Federal funding processes, procedures and criteria for more than ten years. In several instances this has included both litigation and advocacy with several agencies within the federal government. The litigation involved Title III of the Indian Child Welfare Act and the funding caps imposed by the Bureau of Indian Affairs (BIA) through regulation and was eventually resolved through a settlement that doubled Navajo Nation funding. A second case involved an action against the State of New Mexico for denial of equal protection in the manner it distributed federal funds to the Navajo Nation. Specifically, these were Social Services Block Grant funds Title XX. We prevailed in both the Federal District Court and in the Tenth Circuit. The United States Supreme Court later denied New Mexico's petition for certiorari.

A consistent theme that the Navajo Nation has employed, is that the agencies' funding procedures often fail to match funding to the needs of the Navajo Nation. In the recent past the Navajo Nation actively participated in the efforts of the BIA in response to the Fiscal Year 1998 Appropriation Rider, more commonly known as the Tribal Priority Allocation (TPA) Report. That report demonstrated that the BIA's TPA fails to meet the needs of Indian tribes due to more than \$1.3 billion in unmet needs when funding is compared to need that is based on benchmarks from other similar governmental programs operated outside Indian country. The Navajo Nation's unmet need as identified by the TPA Report methodology exceeds \$135 million.

The Navajo Nation believes other federal programs serving Indian communities are similarly underfunded. The Navajo Nation has consistently taken the position that funding for all tribes must be needs-based and that fulfilling those needs must be the driving force in funding federal programs.

The concepts embodied in S.612 are attractive to the Navajo Nation in several respects. First, the requirement that federal agencies periodically assess needs is necessary to determine what level of funding is required to address the issues. Second, in addition to the needs assessment, Section 3(b)(1)(B) also requires the agencies to simultaneously assess the procedures by which funding is awarded and the policy behind the funding initiative. The Navajo Nation's experience has demonstrated that too often not only is the level of funding inadequate to meet actual needs, but that funding requirements, terms and processes often undermine tribal self-government. Generally, it does not appear to be a goal of the agency, but by simply adding tribes as eligible recipients of funds to agency system requirements often ignores the sovereign nature of the Indian governments.

To succeed in the apparent goal of having a comprehensive Federal Indian funding policy, the amount of funds, the mechanisms for distribution, and the funding management requirements must be examined.

The requirement that Indian tribes be consulted within the development of the analysis is essential, provided that consultation is meaningful and not merely a onetime event conducted periodically. The proposed legislation should also define the nature and scope of the consultation process contemplated.

While the concepts of S.612 appear consistent with the Navajo Nation's efforts, several aspects of the bill appear to be confusing. There are references throughout the bill to the Secretary, without clearly defining whether this is the Secretary of the Interior. We assume that it is the bill's intent to have the Secretary of the Interior coordinate the assessments required.

It is further unclear why several Departments are not specifically included in Section 3(a)(1). That Section makes no specific mention of the Departments of Health and Human Services, Education or Housing and Urban Development. In fact the Department of the Interior was not included either. If the goal is to address Indian funding needs comprehensively, the failure to include those departments could undermine this process.

If the Departments of Interior, Health and Human Services, Education, Housing and Urban Development were not included based upon a belief that these Departments are currently distributing funds based upon need or that there are no problems, one need only look as far as the BIA's TPA Report. The Navajo Nation believes all of these agencies experience the same problems as the BIA.

There are also some practical concerns with S.612. Section 3(a)(1) requires a population and service area assessment. Those activities may duplicate ongoing efforts by the BIA and/or the Indian Health Service. It is not clear why those activities would be undertaken when data may already exist. If BIA or Indian Health Service data are used, the consultation process contemplated with Indian governments, could be used to resolve any conditions in the population or service area data.

Finally, S.612 does not appear to create any consequence for a department or agency not to participate or perform the requirements of the periodic assessments the bill contemplates. Fashioning a remedy to address this problem is completed. One could make the agency subject to an action for mandamus in the United States District Court, but the time needed to pursue the action by an Indian tribe could well last as long as the five year period between assessments.

Conclusion

The Navajo Nation supports the goals and concepts embodied in S.612, provided it includes all federal agencies funding Indian tribes and governmental operations.

The Navajo Nation also believes that the development of mechanisms needed to accomplish these goals are a proper step in fulfilling the trust responsibility. The National Academy of Public Administrators' recent report on the BIA appears to contemplate a similar undertaking. That report suggests that the Assistant Secretary Indian Affairs pursue policy initiatives through the Domestic Policy Council. See: A Study of Management and Administration: The Bureau of Indian Affairs, August 1999, Pages 36 and 37. That report suggests that the Domestic Policy Council attempt "to coordinate and harmonize programs for American Indian Alaska Natives, thus creating the possibility of more effective and efficient delivery of services." This appears to be a goal very similar to that of S.612. The combination of the goals may provide a viable vehicle to accomplish what appears to be shared goals.

One must understand that ultimately the problem remains funding, once needs are identified, there must be a commitment to appropriate the funds to address those needs. The Navajo Nation stands willing to assist the Committee in accomplishing both the needs assessment and the funding consistent with those needs.